(22,190)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 295.

JOSEPH MARRONE, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA, S. S. HOWLAND, HENRY J. MORRIS, AND SAMUEL ROSS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Declaration	1
Motion to strike out declaration	3
Motion to strike out declaration granted	3
Amended declaration	3
Plea	5
Joinder of issue	6
Memorandum: Verdict for defendants	6
Judgment	6
Memorandum: Appeal	6
Appeal bond filed	6
Bill of exceptions submitted	6
Bill of exceptions made part of record	6
Bill of exceptions	7

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1912.

	Page
Testimony of Joseph Marrone	7
F. J. Zimmerman	18
Dr. John Lockwood	19
Motion for verdict for defendant	20
Memorandum: Time to file transcript of record extended	21
Directions to clerk for preparation of transcript of record	21
Clerk's certificate	22
Minute entries of argument	23
Opinion	23
Judgment	27
Order allowing writ of error	27
Writ of error	28
Bond on writ of error	29
Citation and service	30
Clerk's certificate	30
Assignment of errors	31

In the Court of Appeals of the District of Columbia.

No. 2019.

JOSEPH MARRONE, Appellant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation) ET AL.

a Supreme Court of the District of Columbia.

At Law. No. 49986.

JOSEPH MARRONE, Complainant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. HOWLAND, HENRY J. MORRIS, SAMUEL ROSS, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed November 27, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49986.

JOSEPH MARRONE, Plaintiff,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. HOWLAND, HENRY J. MORRIS, SAMUEL ROSS, Defendants.

The plaintiff, Joseph Marrone, sues the defendants for that, Whereas the defendant The Washington Jockey Club of the District of Columbia was at and long before and ever since the time of the

commission of the several grievances hereinafter complained of and is now a corporation, created, organized and existing as such under and by virtue of the laws in force in the District of Columbia, and the defendants S. S. Howland, Henry J. Morris and Samuel Ross then were Stewards of said corporation and were as such stewards in control, under the rules and regulations of said corporation, of its affairs and the management thereof; And Whereas, the object for which the defendant corporation was so created and now exists was and is to encourage the art and knowledge of training, managing and improving horses and the horse species and to promote honorable competition therein and to conduct trials of speed and endurance among horses under regulations and to maintain a suitable
2 park track therefor with proper structures and improvements; And Whereas, in pursuance of the object aforesaid the defendant corporation on and before the 23d, 24th, 25th and 26th days of November, 1907, was maintaining and in possession and control, by its Stewards aforesaid, of a certain park track consisting of an enclosed tract of land with certain structures and improvements thereon, situate in the District of Columbia, to wit, at or near Bennings, and was then and there conducting under the direction and management of said Stewards, trials of speed and endurance among horses under certain regulations adopted by the defendant corporation; And Whereas, "doping" a horse, meaning thereby the administration of a drug to a horse with intent to thereby procure artificial stimulation and an abnormal performance by such horse in a trial of speed or endurance, is universally regarded as discreditable and dishonorable; And Whereas the plaintiff, during many years last past, has been engaged in the promotion of the same object for which the said corporation was created as aforesaid and has derived and, until the wrongful acts of the defendants hereinafter mentioned, continued to derive therefrom great entertainment and pleasure and has expended thereon large sums of money and devoted thereto much time and labor and was justly reputed by all who knew him to be an honorable man and incapable of the wrongful conduct charged against and imputed to him by the defendants as hereinafter stated; And Whereas, heretofore, to wit, on the 26th day of November, 1907, in consideration of the sum of Two dollars then paid to the defendant corporation by the plaintiff the defendant corpo-
3 ration agreed with the plaintiff to admit him into and within the enclosure aforesaid during the trials then and there being conducted by the defendant corporation as aforesaid to enable the said plaintiff to witness said trials, and thereupon the plaintiff, then and there, started and attempted to enter said enclosure in accordance with said agreement; but the plaintiff says that thereupon, while he was attempting to enter said enclosure as aforesaid, the defendants well knowing the premises and the defendant corporation by its steward and other officers, agents and employees acting under the direction of and in the name and on behalf of said corporation and in the presence, view and hearing of many people then and there assembled, wrongfully refused to permit the plaintiff to enter said enclosure and with force and arms wrongfully assaulted and

beat the plaintiff and falsely and maliciously, as a pretended excuse or justification for such refusal and assault, charged that the plaintiff at one of said trials conducted by the defendant corporation as aforesaid on the 23d day of November, 1907, had been guilty of "doping" a certain horse called St. Joseph, which had been admitted and entered to compete and did run and compete with other horses at said trial, by means whereof the plaintiff was greatly injured in his person and feelings and reputation and was damaged in the sum of Fifty thousand dollars; and the plaintiff claims judgment in the sum of Fifty thousand dollars ($50,000.); besides costs.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Attorneys for Plaintiff.

4 *Motion to Strike Out Declaration.*

Filed December 17, 1907.

In the Supreme Court of the District of Columbia.

* * * * * * *

Now comes the defendants, by their counsel, and moves the Court to strike out the declaration in the above entitled cause, on the ground that the said declaration is defective, in that it sets forth in one count three distinct causes of action, that is to say, an action of contract, an action of trespass *vi et armis*, and an attempted action of slander, the said declaration thereby being defective because of duplicity.

A. S. WORTHINGTON,
Attorney for Defendants.

Supreme Court of the District of Columbia.

FRIDAY, *December* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the motion of the defendants to strike out the declaration in this cause, it is ordered that said motion be and hereby is granted with leave to the plaintiff to amend as he may be advised within twenty (20) days.

5 *Amended Declaration.*

Filed January 13, 1908.

In the Supreme Court of the District of Columbia.

* * * * * * *

1. The plaintiff, Joseph Marrone, sues the defendants, for that the defendant The Washington Jockey Club of the District of Columbia

was long before and at and ever since the time of the committing of the several grievances hereinafter complained of, and now is, a corporation created, organized and existing as such under and by virtue of the laws in force in the District of Columbia and the defendants S. S. Howland, Henry J. Morris and Samuel Ross were at the time of the committing of said grievances the Stewards of said corporation and as such Stewards in control, under the rules and regulations of said corporation, of its affairs and the management thereof. And the plaintiff says that the object for which the defendant corporation was so created and has continued to exist was to encourage the art and knowledge of training, managing and improving horses and the horse species and to promote honorable competition therein and to conduct trials of speed and endurance among horses, commonly known as horse races, under regulations and to maintain a suitable park track therefor with proper structures and improvements; that in pursuance of the object aforesaid the defendant corporation on and before the 23d, 24th, 25th and 26th days of November, 1907, was maintaining and in possession and control, by its Stewards aforesaid, the defendants Howland, Morris and Ross, of

6 a certain park track consisting of an enclosed tract of land with certain structures and improvements thereon, situate in the District of Columbia, at or near Bennings and called the "Bennings Track," and was then and there conducting, under the direction and management of said Stewards, trials of speed and endurance among horses under certain regulations adopted by the defendant corporation and invited the public to attane and witness the same; that "doping" a horse, meaning thereby the administration of a drug to a horse with intent thereby to procure artificial stimulation and an abnormal performance by such horse in a trial of speed or endurance ever was universally regarded as discreditable and dishonorable; that the plaintiff, during many years last past, has been engaged in the promotion of the same object for which the said corporation was created as aforesaid and has derived and until the wrongful acts of the defendants hereinafter mentioned continued to derive therefrom great entertainment and pleasure and has expended thereon large sums of money and devoted thereto much time and labor and was justly reputed by all who knew him to be an honorable man and by reason of such reputation for many years last past horses produced by him were permitted to compete and did compete in such trials as aforesaid at the track of the defendant corporation and other tracks at other places, to the great profit and pleasure of the plaintiff and on the 23d day of November, 1907, a certain horse known as St. Joseph produced by him for that purpose was by the defendants permitted to compete and did compete in one of said trials then being con-

7 ducted at the track of the defendant corporation as aforesaid. And the plaintiff avers that heretofore, to wit, on the 23d day of November, 1907, the defendants Howland, Morris and Ross, acting as such Stewards, under the direction of the defendant corporation, in control and having the management of its affairs, conspired together with other persons whose names are to the plaintiff unknown, with intent to destroy the plaintiff's good reputation as aforesaid and to prevent horses to be produced by him from competing in such

trials as aforesaid at said Bennings Track or at other tracks, and to prevent the plaintiff from witnessing such trials at said Bennings Track or at other tracks and to humiliate and injure him in his person, his feelings and his reputation. And the plaintiff further avers that on, to wit, the 26th day of November, 1907, in pursuance of the conspiracy and intent aforesaid and in the presence of a great multitude of people at said Bennings Track, the said defendants, by their agents employees whose names are to the plaintiff unknown, and acting on behalf and under the direction of the defendants, unlawfully and forcibly, prevented the plaintiff from entering said enclosure to witness the trials then and there being conducted as aforesaid and with force and arms did assault and beat the plaintiff and falsely and maliciously, as a pretended justification therefor, publicly charge that the plaintiff had on or about the 23d day of November, 1907, doped said horse St. Joseph, and other wrongs to the plaintiff then and there did, by means whereof the plaintiff was greatly injured in his person, his feelings and his reputation and damaged in the sum of Fifty thousand dollars; And the plain-
8 tiff claims judgment in the sum of Fifty thousand dollars ($50,000.), besides costs.

2. And the plaintiff also sues the said defendants for that heretofore, to wit, on the 25th day of November, 1907, the defendants, by their agents and employees, at or near Bennings in the District of Columbia, with force and arms assaulted the plaintiff and then and there hindered and prevented him from entering into a certain enclosure known as the Bennings Race Track and which it was then lawful for the plaintiff to enter and then and there beat and ill-treated the plaintiff and imprisoned and kept and detained him there imprisoned for a great length of time and other wrongs to him then and there did, whereby the plaintiff was injured and damaged in the sum of $50,000. And the plaintiff claims judgment in the sum of Fifty thousand dollars ($50,000.), besides costs.

3. And the plaintiff also sues the said defendants for that heretofore, to wit, on the 26th day of November, 1907, the defendants by their agents and employees, within the District of Columbia, with force and arms again assaulted and beat the plaintiff and other wrongs to him then and there did; whereby the plaintiff was injured and damaged in the sum of $50,000. And the plaintiff claims judgment in the sum of Fifty thousand dollars ($50,000.), besides costs.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Attorneys for Plaintiff.

9 *Plea.*

Filed February 6, 1908.

In the Supreme Court of the District of Columbia.

* * * * * * *

The defendants and each of them, jointly and severally, for plea to the plaintiff's declaration and each count thereof say that they are not guilty as alleged.

A. S. WORTHINGTON,
Attorney for Defendants.

Joinder of Issue.

Filed February 6, 1908.

In the Supreme Court of the District of Columbia.

* * * * * * *

The plaintiff joins issue upon the defendants' joint and several plea to the plaintiff's declaration.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Attorneys for Plaintiff.

Memorandum.

December 21, 1908.—Verdict for Defendants.

10 Supreme Court of the District of Columbia.

TUESDAY, *December 29th*, 1908.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice.

* * * * * * *

It appearing that, under the Rule of Court, judgment on verdict should be entered herein, it is so ordered; wherefore, it is considered and adjudged, that the plaintiff herein take nothing by this action; that the defendants go hereof without day, be for nothing held and recover of plaintiff their costs of defense, to be taxed by the clerk, and have execution thereof.

Memoranda.

January 4, 1909.—Appeal noted in open court and bond fixed at $100.
January 19, 1909.—Appeal bond filed.
January 29, 1909.—Bill of Exceptions submitted to Court.

11 Supreme Court of the District of Columbia.

WEDNESDAY, *April 21st*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

The Court this day signs the Bill of Exceptions taken at the trial of this cause, and heretofore submitted, and hereby orders the same made of record *nunc pro tunc*.

12 In the Supreme Court of the District of Columbia.

At Law. No. 49986.

JOSEPH MARRONE, Plaintiff,

v.

THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation) ET AL., Defendants.

Bill of Exceptions.

Filed April 22, 1909.

Be it remembered, That at the trial of the above entitled cause, on the 17th and 21st days of December, A. D. 1908, before the Honorable Harry M. Clabaugh, Chief Justice of this court, and a jury, the plaintiff, to maintain the issues on his part joined, adduced evidence tending to prove that the defendant The Washington Jockey Club of the District of Columbia was on November 28, 1902, duly incorporated under the laws in force in the District of Columbia; that one of the purposes for which the defendant corporation was incorporated was to conduct horse races at a race track to be maintained by it and that the defendant corporation has maintained such a track at Bennings in said District; that the plaintiff, a citizen of the United States, residing in New York City, is a contractor and builder, engaged in building railroads, water works, buildings and on other works, and is interested in horse racing and maintains a racing stable and at present keeps three race horses; that the defendant corporation conducted horse races publicly, at its said track during the period commonly known as the Fall Meeting, 1907, commencing November 16, and ending November 30, 1907, and
13 by printed advertisements invited the public to attend and witness said races, during which said period the defendants, Howland, Morris and Ross were the Stewards of the defendant corporation and as such, under its rules, had entire control of said track and said races; that the horse known as St. Joseph was duly entered by the plaintiff as trainer and permitted by the defendants, to run and did run in one of said races on Saturday, November 23, 1907, and that in said entry the plaintiff was entered as trainer of said horse and the plaintiff's daughter was entered as owner of said horse; that said races were advertised by the defendants to commence each day at two o'clock P. M.; that during said Fall Meeting, 1907, the defendants maintained in their employ at the gate of public entrance to said track a gate keeper in charge of said gate and of a certain box there in which the coupons attached to admission tickets were required to be dropped, and also maintained an office at or near said gate for the public sale of tickets of admission to said track and also maintained in their employ at said gate and upon said track a force composed of seven or eight or more men known as Pinkerton men, including among them one called Captain Duhain; that about half

past one o'clock P. M. on Monday, November 25, 1907, at said ticket office, the defendants in consideration of the sum of two dollars then and there paid to them by the plaintiff, sold and delivered to him a certain ticket of admission with a coupon attached, upon the face of which said ticket is printed the following:

"Washington Jockey Club
Grand Stand
Fall Meeting 1907
12523
8"

14 and upon the back of said ticket is printed the following:

"Grand Stand (12523)
"8

"The purchaser or holder of this ticket or badge of admission accepts the same and is admitted to the grounds of the Association upon the following expressed conditions:

"1. That he will not violate any provision of any statute prohibiting pool-selling, bookmaking or other gambling.

"2. That he will comply with and obey all the requirements, rules and regulations prescribed by the Association.

"3. That upon a breach of any of the above provisions, he will, at the request of any officer of the Association, immediately leave the grounds, and the decision of such officer that such breach has occurred shall be conclusive.

"4. That upon failure to comply with such request, he may be removed upon the order of any officer of the Association without any reason being given therefor.

"5. That he expressly waives all claims of any kind against the Association, or any officer thereof, for such expulsion. No person who has been ruled off the grounds of the Association can be admitted by this badge."

and on the face of said coupon is printed the following:

"Grand Stand
"8"

and on the back of said coupon is printed the following:

"Grand Stand
"To be dropped in Gateman's Box
"8
"12523";

that the figure 8 on the face of said ticket and on the face of said coupon indicated the 8th day of said Fall Meeting, which 8th day was November 23, 1907; that among the "requirements, rules and regulations" referred to in the matter printed on the back of said

ticket is the following rule, "Any person who shall have administered a drug or stimulant internally or by hypodermic method prior to a race, or who shall have used appliances electrical or mechanical other than the ordinary whip and spur, every person so offending shall be ruled off;" that the plaintiff thereupon then went to the said gate and proceeded and attempted to pass through the gate and into and upon said track at the same time attempting to put the
15 coupon in the box but the gate keeper stopped him there at the gate and refused to permit him to pass through and said gate keeper then called to his assistance the said Capt. Duhain and other Pinkerton men aforesaid; that thereupon the following conversation then and there occurred between Duhain and the plaintiff, viz: By Duhain: "You can't get in;" Plaintiff: "Why? I paid for my ticket;" Duhain: "I have got an order from the Stewards. You got ruled off Saturday;" "I say, 'well that is nothing new.' I say 'I pay my way,' I couldn't get in. Well, I went away;" that the Pinkerton men then laid hands upon the plaintiff and forcibly removed him from the gate and out to the curb on the public sidewalk outside the track; that on the following day, Tuesday, November 26, 1907, at or about two minutes before two o'clock P. M. at said ticket office, the defendants in consideration of the further sum of Two dollars then and there paid to them by the plaintiff, sold and delivered to him a certain other ticket with a coupon attached, the printed matter upon the face and back of said ticket and coupon being the same as that on the ticket for Monday aforesaid excepting that in lieu of the figure 8 appeared the figure 9, indicating the 9th day of said Fall Meeting, the same being November 26, 1907, and in lieu of the number 12523 appeared the number 11360; that the plaintiff could not read and knew nothing about the reading matter on said tickets; that the plaintiff thereupon went to said gate and dropped said coupon into said box and proceeded and attempted to pass through said gate and into upon said track but the gate keeper again stopped him and said "You can't go in; hold on Marrone, you can't get in," and called Capt. Duhain, who with the gatekeeper then laid hands on the plaintiff and forcibly removed him from the gate and prevented him from entering into said track there
16 being several other Pinkerton men present; that on each of said occasions, on Monday and Tuesday, many people, from sixty to seventy, who had come there to witness the races, were present at the gate and witnessed what occurred there as above stated and that on each of said occasions the defendant Howland's name was mentioned by Capt. Duhain as one of the Stewards who had given the order for the exclusion of the plaintiff from the track.

And thereupon at this point, while the plaintiff was testifying as a witness on his own behalf, he further testified as follows:

Q. You have said something about the Captain's statement that you had been ruled off? A. Yes, sir.

Q. We want to know something about that. Had you brought any horses to race at this track on that occasion? A. Yes, sir.

Mr. WORTHINGTON, of counsel for defendants: Before we go into that I would like the privilege of cross examining the witness about

the alleged assault, so that your Honor may determine whether it is competent to go into what led up to it.

Mr. BAILEY, of counsel for plaintiff: I would like to know what the precise purpose of the cross examination at this time is.

Thereupon counsel for defendants, by permission of the court proceeded to cross examine the plaintiff touching the matters hereinabove stated tending to prove the alleged assaults and upon such cross examination the plaintiff testified in substance as follows:

That when he went to the grounds of the Jockey Club on
17 Monday, the first time he was kept out, his secretary was with him and there were a good many people going into the grounds. That there were three or four little runways at the gate, just wide enough for one person to get in; that the man at the gate would generally tear off the coupon, and that on Monday his coupon was not torn off or dropped in the box. That he did not get up to the box on that occasion, but was stopped by one of Capt. Duhain's men whose name he did not know, at the gate right in the runway; that that person was right in the aisle and said, "You can't get in," to which the plaintiff replied, "Why?" and he, the man, said, "You got ruled off Saturday." Plaintiff then went away. That the man put out his hands and said, "You have to get out" and took the plaintiff by the arm putting him on the other side of the gate. Plaintiff was half way in and trying to get in when the man said you can't get in. While plaintiff was trying to get in, there were lots of people who wanted to get in. Captain Duhain was there but had nothing to do with putting the plaintiff out on that occasion. After plaintiff had gone out, Captain Duhain said to him, "You can't get in by order of Mr. Howland." He said he would give plaintiff two dollars and he may have put his hand in his pocket. Plaintiff said, "I didn't come down to the race track to get two dollars back," and Duhain told the plaintiff that he wanted to give him the two dollars; that he, the plaintiff, said he wanted to see the race.

Q. You told him you would not take the two dollars back? A. Yes, sir, that is what I told him.

Q. He told you then you would not be allowed on the track? A. Yes, sir.

Q. That orders had been given to keep you out? A. Yes,
18 sir.

Q. And the next day when you went back there you knew that orders has been given to keep you out? A. I didn't know that it was every day, no sir.

Q. It is not a fact that after you had been kept out on Monday you went and consulted a lawyer, and then went back and was acting under his advice? A. No, sir; no sir.

Q. That is not so? A. No sir.

Q. Had you talked with anybody about bringing suit in the meantime? A. No sir.

Q. The next day you went in with this badge? A. Yes, sir.

Q. And you went in quickly and tore off the coupon and threw it into the box? A. Yes, that was on Tuesday.

Q. For the purpose of trying to get a right to get in? A. Yes, like anybody else.

Q. And then you were told again that you could not get in? A. Yes, sir.

Q. And you stood there in the runway? A. Yes, sir.

Q. And you got hold of the bars on each side? A. Oh, no, I never caught hold of the bars. The man that was on the gate caught hold of the bars.

Q. So that you could not get in? A. Yes, sir.

Q. Did you get out of the way then? A. No, the other man said, "Wait for the Cap."

Q. They asked you to wait there while they sent for the Captain? A. Yes, for the Cap. And they turned around and the Cap was right there, and he said, "You can't get in." And I said, "Why," and he said, "You got ruled off Saturday."

Q. You were then in this runway? A. I was talking to him, I was talking to the Cap. I was standing there, yes, because that was the only place the Captain was, and I could not talk to him anywhere else.

Q. You threw the coupon in and then stood there in the runway? A. Yes, sir.

Q. And he told you you could not go in? A. Yes, sir.

Q. Did you back out then? A. No, I wanted to know the reason why.

Q. What did you say? A. I wanted to know the reason, and he told me I was ruled off from this time on, that I could not go in.

Q. Then what did you do? A. I was talking to him, and I said, "My coupon is in the box," I said, "I put it in the box." He said "you can't get in," and he tried to push me out.

Q. And you still stood there and insisted on getting in? A. I told him my coupon was in the box, and my $2 was still gone.

Q. And then he came up and put his stomach against you, you said? A. Yes, sir.

Q. Did you yield to the pressure of his stomach? A. I don't know. If I was a machine I might do so.

Q. As a matter of fact, you stood there and did not back out? A. I backed out, but he wanted me to go too fast, and then he took both hands and put me out, and in about 15 seconds I think there were 15 men there.

Q. Captain Duhain was the only man that touched you? A. And the man on the gate.

Q. He didn't hurt you? A. He pulled me out.

Q. He did not hurt you? A. I say he pulled me out.

Q. I asked you whether he hurt you. A. He could not hurt me except he hit me.

Q. Except what? Q. Except he hit me. Then it would be a different thing.

Q. He didn't hit you? A. No, he could not hit me, but he caught hold of me.

Q. There were a lot of people there to go in then? A. Yes, and there were a lot of gates to go in. There were three or four runways to get in.

Q. Mr. Duhain followed you out at that time? A. Yes, sir.
Q. And he offered you your $2? A. Not at that time, no sir.
Q. He didn't say anything about the $2? A. No, not Tuesday.
Q. Are you clear about that? A. I swear to it, I cannot do anything else.
Q. Of course you are swearing to everything you say; but you are positive about that, are you? A. Yes, sure.

Q. And then you went away? A. No, then he said, "If you
21 don't go away I will arrest you," and I turned to him and said to him, "If you have power enough to arrest me, do it."

Q. There was no more laying of hands on you after he got you out of the runway? A. No, he said, "You better go," and I went away.
Q. And on both of these occasions he used as much force as was necessary to get you out of the runway? A. No, not the last time I was there. He used more force the last time than he used on Monday.
Q. You stood your ground a little better on Tuesday than on Monday, did you not? A. No, sir.
Q. What do you mean? A. I spent just as much time then as Tuesday.

Thereupon the plaintiff adduced evidence tending to prove that on the 17th, 25th, 26th, 27th and 28th days of November, 1907, various newspapers published in the city of Washington, in said District contained the following advertisement, viz:

In the Washington Herald, November 17, 1907.

"Races—Autumn Meeting Washington Jockey Club—Nov. 16 to Nov. 30,—Six Races Daily—First Race 2 P. M.—Admission to Grand Stand $2.00; Paddock 50¢ Extra; Ladies $1.00.
"Season grand stand and paddock badges for sale by S. T. Walton, Lenman Building, 1425 New York Ave. Nw., room 103, and Jones' Ticket Agency, 1219 E St., nw. Clubhouse badges for sale by S. T. Walton, Lenman Building, 1425 New York ave. Nw., room 103; 'phone Main 5034.
"N. M.—Objectionable characters positively excluded."

22 In the Washington Times, November 26, 1907.

"Races—Autumn Meeting—Washington Jockey Club—Nov. 16 to Nov. 30—Tomorrow, Wednesday, The Dixie, at a mile and three quarters, and five other good races.—First Race, 2 P. M. Admission to Grand Stand, $2.00—Paddock, 50¢ extra.—Ladies $1.00—Electric Cars direct to course every minute from 15th and New York Ave. N. W. Fare 5¢.
"N. B.—Objectionable characters positively excluded."

In the Washington Herald, Nov. 25, 1907.

"Races—Autumn Meeting Washington Jockey Club—Nov. 16 to Nov. 30—Six races daily, first race, 2 P. M.—Admission to Grand-

stand, $2.00; Paddock, 50¢ extra; Ladies $1.00—Electric cars direct to the course, every minute from 15th st. and New York Ave. N. W., Fare 5¢!

"N. B.—Objectionable characters positively excluded."

In the Washington Star, November 27, 1907.

"Races—Autumn Meeting Washington Jockey Club—Nov. 16 to Nov. 30—Six Races Daily, First Race, 2 P. M.—Admission to Grand Stand, $2.00; Paddock, 50c. extra; Ladies $1.00—Electric Cars direct to course every minute, from 15th St., and New York Avenue N. W. Fare 5c.

"N. B.—Objectionable characters positively excluded."

In the Washington Post and the Washington Herald, Nov. 28, 1907.

"Races—Autumn Meeting Washington Jockey Club—Nov. 16 to Nov. 30—To-day, Thanksgiving Day—The Washington Cup at 2¼ miles. The Junior Steeplechase and 2½ miles. An Open steeplechase and Three other grand races.—First race, 2 P. M.—Admission to Grand Stand $2.00; Paddock 50c. extra; Ladies, $1.00—Electric cars direct to course every minute, from 15th St. and New York Ave. N. W. Fare 5c.

"N. B.—Objectionable characters positively excluded."

23 Counsel for defendants then admitted that said advertisements were by authority of the defendant the Washington Jockey Club.

And thereupon the direct examination of the plaintiff was resumed by his attorney and the plaintiff as a witness on his own behalf, further testified as follows: After I put the coupon in the box I stood there because they stopped me. In saying they did not hurt me I meant physically; they hurt me in my feelings, of course.

Mr. WORTHINGTON: If there is any attempt to go into what happened on Saturday, I object to it, on the ground that it now appears that this assault was nothing more than the exercise of a right on the part of the defendant, the Washington Jockey Club and its stewards, to use what force was necessary to keep the plaintiff out of their premises. It appears from the testimony of the plaintiff himself that he went there and insisted on blocking the passage, and no force whatever was used except what was necessary to get him out of the way. I submit that he has no right of action. He was informed before anything was done, on the first day, in the way of obstructing or handling him in any way, he was informed before his coupon was put in the box, that orders had been given to keep him out. But instead of acquiescing and going peaceably away, he insisted on what he claimed was his right, to go in. And on the second occasion, your Honor, will perceive that this happened after he had been informed, on the first occasion, that orders were given to exclude him; and he went there for the purpose, evidently, of making a case.

The COURT: I need not tell Mr. Bailey that a count can only contain one cause of action, Mr. Bailey knows that too well. Now,
24 what is the cause of action in that first count? Give me the cause of action.

Mr. BAILEY: Well, the cause of action, then is the conspiracy; I will take that view, the view that your Honor took a moment ago. It is the conspiracy. Their liability arises out of the act, the overt act, committed in pursuance of the conspiracy. The purpose of it, or among the purposes of it are the unlawful acts, used as means to effect the purpose.

The COURT: Very well, then the charge is that of conspiracy, and the other acts are—

Mr. BAILEY: In accomplishment of the conspiracy.

The COURT: Are overt acts in accomplishment of that conspiracy through which he was injured.

The COURT: (continuing after a pause): In the first count, counsel says he is proceeding on the theory of conspiracy, a conspiracy to injure the plaintiff's name, and in furtherance of that conspiracy the purpose was to defame the plaintiff's good name, to prevent his horses being run, and one thing and another and that in furtherance of that conspiracy they caused him to be assaulted, and that in the assault it was publicly announced that he was kept from the track because of the doping of a horse. That seems to be the theory of the case as announced by counsel. That being so, the only question is, has any overt act been offered in proof of this conspiracy? I mean overt act as a consequence of this conspiracy. As yet, there has been no suggestion of any conspiracy, there has been no proof of any conspiracy, and therefore I take it that on that theory of the case the testimony that is now to be offered would be competent, upon the proof of the conspiracy. But inasmuch as the Court does not require the proof of conspiracy
25 before some overt acts are submitted to be introduced, it will be admitted, with the promise that the conspiracy will be shown. I assume, under that theory, the Court will be compelled to allow the testimony.

Mr. WORTHINGTON: And the Court will allow me an exception?

The COURT: Yes.

Mr. WORTHINGTON: In order that we may not have to run through a long record to get to the point, I would state that the ground of the objection to the testimony is this. I object to the testimony as to what happened on the preceding Saturday, as to the doping of the horse, or the charge of doping the horse, and the plaintiff being ruled off the track; I object to it because, as it now stands, it simply appears that the plaintiff was prevented from going into the race track, into the enclosure, and it further appears from the evidence in the case that that was an exclusion which these defendants had a right to make, and that their motives in so doing it are not properly to be considered in the case.

I may say here, your Honor, as your Honor said a while ago, that my defense is that we had the right to exclude him. Of course,

your Honor does not mean that I admit in any way the alleged conspiracy.

The COURT: No, I only said that because I thought the count was for assault and battery.

Mr. WORTHINGTON: As this is put upon the ground of conspiracy, I wish to further object to going into this evidence on the ground that a conspiracy is not a subject of a civil action for damages under any circumstances whatever.

The COURT: That can be controlled afterwards.

26 Mr. WORTHINGTON: That is a matter which I contend belongs to another branch of the court.

The COURT (to Mr. Bailey): You were about going into the question of what happened on Saturday.

And thereupon the direct examination of the plaintiff as a witness on his own behalf was resumed and he further testified as follows:

I had then four horses at Fowler's stables about half a mile beyond the race track and had in my employ in connection with the horses a foreman, an exercise boy, a groom and a jockey. They slept in the stall next to my horses and ate in the Fowler house about 125 feet from where they slept. St. Joseph was one of the horses I had there. I had him entered for a race at the defendant's track on Saturday, November 23, and for another race on Monday, November 25, 1907. He ran in the first race on Saturday, November 23d. He belongs to my daughter. I was handling him as trainer. I bought him and gave him to her. I had known him for a year and had seen him race. On this Saturday, November 23, 1907, I saw him in his race all the way round to the finish. I first saw him that day about fifteen minutes to two. The race was to be at two. I then had a trainer's badge and license. Soon after the race one of the employees of the defendants came to me on the track and demanded my trainer's badge and license. I refused to give them up and went to the Stewards and saw the defendants Howland and Morris. The defendant Ross was not present and Mr. Morris did not do any talking. My conversation was with Mr. Howland and as follows: MARRONE: "What about me; You want to take my badge off?" HOWLAND: "Now, Mr. Marrone, your horse has got a stimulant." MARRONE:

27 "I just sent him to the stable. We can send for the horse and take two or three men, the best veterinarians in Washington, and I will pay the bill, to see whether that horse is doped or not." They would not have that. Then I said, "Well, destroy the horse, and I will sign any paper you want, so that it won't cost the Jockey Association five cents, but it will be for my reputation" and he would not have that. He, Howland, said, "No, we are going to stand by our man," referring to Dr. Grange, the veterinarian employed by the defendants. Mr. Morris heard this conversation but said nothing. Mr. Ross was not there. I then told Mr. Howland everything; that Dr. Grange, the veterinarian employed by him, had been to the paddock since the race and had examined the horse, saying the Stewards had given him an order to do so; that I had told Dr. Grange, after he made the examination if

there was any doubt about the horse to call two or three men and I would stand the expense; that Dr. Grange had then said, "That is all right Mr. Marrone," that I had then said to Dr. Grange, "No, don't say all right and then go to the Stewards and give a different report"; that Dr. Grange then said, "No; that's all right; that's all right." That I then said to Dr. Grange, "if you appoint two or three men we will see about it and we will destroy the horse right here. I am not after this for the race track or for the Jockey Club but for my reputation." I explained that to Mr. Howland
28 and Mr. Ross and Mr. Morris.

By Mr. BAILEY:

Q. Now I wish to proceed with proof tending to show positively that the horse was not doped, and that there was no justification or reason to suspect it even, that there was absolutely no ground for it, as one of the points which tend to show a conspiracy.

The COURT: How can that come out until they allege it on the other side?

Mr. BAILEY: It seems to me it is one of the circumstances showing malice, to injure this man.

The COURT: But he has already said he was not doped.

Mr. BAILEY: No, he has not said that; Dr. Grange said so.

Mr. WORTHINGTON: What he said was that Dr. Grange said he was not doped.

Mr. BAILEY: Now I want to show that the horse was not doped. I understand, as Mr. Worthington says, that that may open up quite a field here, but that is proper, we think, and if it is proper we should not consider the question of time.

The COURT: You do not want to ask but one question do you?

29 Mr. BAILEY: No, sir.

The COURT: You can ask him whether the horse was doped as a matter of fact.

By Mr. BAILEY:

Q. Mr. Marrone, was that horse, Saint Joseph, at the time he ran the race on that Saturday, November 23, 1907, doped or stimulated or under the influence of any dope or drug or stimulant?

Mr. WORTHINGTON: I object, for two reasons. In the first place, all the witness could testify to would be whether he had doped him or not, but waiving that, I object to the question on the ground that there is nothing in the issue that justifies going into the question as to whether he was doped or not; there is no averment that he was doped or was not doped. The only charge is that it was said at the time of the alleged assault that the horse had been doped.

The COURT (after further discussion): I think the question of doping is not an issue at all, Mr. Bailey, until that question is raised on the other side, and if it ever is raised then you should have an opportunity of showing it was not true, that the charge is not true. You have charged conspiracy against these defendants, with intent

to injure the plaintiff by falsely and maliciously assaulting him and charging he was ruled off because he doped his horse. So I do not see how that is in issue now.

Mr. BAILEY: Will you- Honor permit me to call your attention to one further thing? There was a rule in force there at that time, as shown by this book, which was handed around, which I would like to read.

(Mr. Bailey read aloud the rule mentioned in the evidence to the effect that any person who shall administer a drug or stimu-
30 lant to a horse prior to a race, and so forth, shall be ruled off.)

The COURT: The question now is not whether he was ruled off, but whether he was ruled off by the conspiracy for the purpose of injuring him.

Mr. BAILEY: That is right. Now then, no one has ever asserted that he doped the horse——

The COURT: That is not the case, here, that is the trouble all the way through the case. You have not brought a case because of his being ruled off. You have brought a case of conspiracy.

Mr. BAILEY: If your Honor please, here it is. One of the acts of the conspiracy was to prevent him from witnessing such trials at Bennings or other tracks. We do not have to allege this in the declaration, this is a matter of proof.

The COURT: I do not think the question is in issue at all now.

Mr. BAILEY: Very well.

The COURT: If it should get in issue, if that question should arise, I will let you put in the proof.

Mr. BAILEY: May I ask, is it understood that we have a right at this time to rely upon the presumption that he had not done the things——

The COURT: You have a right to pay no attention to it until it is asserted that he had done them. Now, the only point is, did these defendants conspire?

Mr. BAILEY: Then we want to show that there was no evidence whatever tending to show that the horse was doped. The horse had every appearance of a horse free from dope.

The COURT: I sustain the objection, until there is some
31 evidence to show that the horse was doped, or, rather, I should say some evidence reflecting upon the question as to whether or not the horse was doped. At present that is not in issue.

Thereupon the plaintiff, by his attorneys, duly tendered testimony tending to prove injury to the plaintiff, in his reputation and otherwise, by reason of his being ruled off and excluded from the track as hereinbefore stated, to which counsel for the defendants objected and thereupon the court overruled such tender and excluded such testimony and stated, "The only question at all that I can see is as to the proof of damages. You see you are going a good ways. I have permitted you to prove any overt acts on condition that you would follow it up by showing there was a conspiracy. This would be simply wasting time. Why not leave this part of the case just where it is and go on with the case and show some conspiracy, some

evidence of conspiracy, and then we can come back to the question of damages. I will let you recall the witness then," to which ruling the plaintiff, by his attorneys, then and there duly excepted and the Chief Justice then duly noted the exception in his minutes.

Thereupon F. J. ZIMMERMAN, a witness produced, sworn and examined on behalf of the plaintiff testified as follows: I am a druggist, living in Brooklyn, N. Y. I never knew Mr. Marrone, the plaintiff, until yesterday afternoon. I have known Capt. Duhain, one of the Pinkerton men, for fifteen years. In August, 1907, at the Brighton Beach races, he came to me and talked about Mr. Marrone.
Q. "State what Capt. Duhain said to you that affected in any way
Mr. Marrone." Thereupon Mr. Worthington, of counsel for
32 defendants said "I object to any statement made by Captain Duhain out of the presence of these defendants. I have no objection to counsel stating openly what he expects to prove.

Thereupon Mr. Bailey of counsel for the plaintiff stated to the court as follows:

"As I stated in the opening, we regard Captain Duhain as a party to this conspiracy. I offer to prove by this witness that Captain Duhain came to him in August, 1907, and endeavored to get a statement from him as to whether it was true or false that Mr. Marrone had obtained from him dope for horses a short time before this Bennings meeting. That is what I now offer and expect to prove by this witness.

"In connection with the charge of conspiracy, it is an accusation that cannot be proven—I do not know that it ever was established by direct proof. It has to be proven and always is proven by taking together the facts or acts that they have done, and from those facts it is left to the inference of the jury. This is a circumstance that seems to me to bear directly upon this question, in view of his connection with the defendant corporation, and the individual defendants, as the stewards—that they were then trying to fasten this charge upon him."

The COURT: "Will you make your statement of what you expect to prove in support of your charge of conspiracy. State the whole thing."

Mr. BAILEY (of counsel for plaintiff): "In addition to this?"

The COURT: "Yes. Mr. Worthington, do you want the jury withdrawn?"

Mr. WORTHINGTON (for defendants): "No."

33 Mr. BAILEY: "In addition to this which I have just stated we desire to offer and expect to prove by this witness, we rely also upon further evidence which we heretofore have offered and again now offer, tending to prove that the charge that the horse was doped is absolutely false, that there was absolutely no reason to believe it to be true, and that they sought this means to fasten that charge, to fasten the odium upon him, in order to exclude him from the track, by making a false charge to accomplish his expulsion or ruling off the track, the false charge that the horse was stimulated or doped on this Saturday which is referred to in the evidence; that

it not only is untrue, but there was absolutely nothing in the condition of the horse after or during the conduct of the race to justify such charge; we offer to prove that the defendants have absolutely no ground whatever to even suspect that the horse was doped; and upon that we expect to argue, as well as upon some other circumstances, (but those are the principal facts) that the jury might infer malice, they might infer malicious purpose and intent and a conspiracy to injure this man. It seems to me that is the principal thing. As I understand the authorities, there is great latitude allowed in connection with a charge of conspiracy."

The COURT: "It was in view of that that I have been allowing you to go on as you have. I thought I was giving you the utmost latitude. Do I understand that that is your full case, or what you propose to offer in proof of this conspiracy? You have made your statement, and the stenographer has it."

Mr. BAILEY: "Yes, sir; taking also into consideration all the facts that are in evidence, that have been admitted in evidence."

34 The COURT: "Yes; that is what I mean. Your statement, and what is in evidence, constitute your case."

Mr. BAILEY: "Yes, sir."

Mr. WORTHINGTON: "I make the objection to his offer on the ground that these things do not come within a hundred miles of evidence to go to the jury in proof of the charge of conspiracy."

The COURT: "The objection is sustained on the ground that Mr. Bailey's offer of evidence is not sufficient to prove the charge of conspiracy. I will say that to you, to let you know, Mr. Bailey, the ground of the ruling, that it may be incorporated in the record. Very well; the objection is sustained."

Mr. BAILEY: "I note an exception.

The exception was then noted by the Chief Justice in his minutes.

Thereupon Dr. JOHN LOCKWOOD, a witness of lawful age was called by and on behalf of the plaintiff and duly sworn;

Mr. BAILEY: "I apprehend that the evidence of this witness is within your ruling, but I desire that he go on the stand in order to have a formal ruling."

Mr. WORTHINGTON: "I will agree to any preliminary statement you make. Just make a formal tender of evidence."

Mr. BAILEY: "I expect to prove by this witness that he is a veterinarian here in this city of many years' experience; that on the evening of Saturday, November 23, 1907, he was summoned by Doctor Robinson, another veterinarian here, to go with him, having been employed by the plaintiff here, to examine this horse, Saint Joseph, as to whether or not he had been or was then under the influence of dope or any stimulant or drug; that these two doctors went there together. I expect to prove, by him and also by Doctor Robin-

35 son, (I am now offering to prove this much by him) that they went there and examined the horse on the same evening and found absolutely no evidence that he was then or had been on that date, under the influence of a drug or stimulant, and that in their opinion, they being qualified in such matters, he was not at

the time of the race under the influence of any drug or stimulant or dope."

Mr. WORTHINGTON: "I object to that on the ground which your Honor has already sustained. As the case is situated, there is no room for that evidence."

The COURT: "The objection is sustained, and you will want to reserve an exception."

Mr. BAILEY: "Exactly; we reserve an exception."

The exception was then noted by the Chief Justice in his minutes.

(Witness excused).

Mr. BAILEY: "I take it, that it is not necessary for me to call any other witnesses."

The COURT: "No, it is not."

Mr. BAILEY: "I now offer to prove by the plaintiff that as far as he knew the horse was not doped; I renew that offer. I also offer to prove by all the men who were in his employ—the jockey who rode the horse, the groom, the stable boy, all of those boys whom the plaintiff named while on the stand—to prove by all of them that they were with the horse all that day prior to the race, and that no drug or dope or stimulant was administered; that, as a matter of fact, it could not have been administered without their knowledge. I make that offer."

Mr. WORTHINGTON: "I make the same objection."

The COURT: "The objection is sustained."

36 Mr. BAILEY: "I note an exception."

The Chief Justice then noted the exception in his minutes.

The COURT: "I ought to say to you, in fairness, Mr. Bailey, as to your offer to prove a conspiracy, that the view of the Court that all of this other evidence is utterly immaterial is because the Court does not think the case has even approached a condition of proving conspiracy."

Mr. BAILEY: "I think your Honor for that statement."

The COURT: "That is why it is done. I do not think the doping of the horse is in issue, certainly not until you have proven some conspiracy, and until you have proven a conspiracy the Court cannot take your offer. In view of the fact that the Court does not think there is contained in the evidence already admitted, or in your offer, anything which constitutes a conspiracy, this other evidence has become utterly immaterial. That is the view of the Court. You can take that on the record."

Mr. BAILEY: "We make the same offer in regard to Doctor Robinson."

The COURT: "One witness, Mr. Bailey, is as good as a hundred."

Mr. BAILEY: "It seems to me, if the Court please, that is our case; under the ruling of the Court, we are at the end of our case. I will say frankly that we came here expecting that the main issue would be as to whether or not that horse was doped."

The foregoing was all the testimony adduced at the trial.

Mr. WORTHINGTON: "If your Honor please, I move that the Court instruct the jury to return a verdict in favor of the defendants, on

the ground that there is no evidence in support of the alleged conspiracy."

The COURT: "There are two other counts in the declaration."

Mr. WORTHINGTON: "I understood they had abandoned those and rested upon the conspiracy."

37 Mr. BAILEY: "Oh, No."

Mr. WORTHINGTON: "I make the same motion in respect to the other counts, on the ground that there is no evidence to show any assault within the meaning of the law."

And thereupon the Court, upon the motion of counsel for the defendants and over the objection of the plaintiff by his attorneys, instructed the jury to return a verdict for the defendants, to which instruction the plaintiff by his attorneys then and there duly excepted, and the Chief Justice then duly noted the exception in his minutes.

Thereupon the jury, in compliance with said instruction, returned a verdict for the defendants, upon which verdict judgment for the defendants was entered on the 29th day of December, A. D. 1908.

And thereafter the plaintiff, by his attorneys, on the 29th day of January, A. D. 1909, duly presented and submitted this, his bill of exceptions and prayed the court to settle and sign the same as of the 21st day of December, A. D. 1908, *nunc pro tunc*, and to cause the same to be made part of the record in said cause, and the same is accordingly done, this 21st day of April, A. D. 1909.

HARRY M. CLABAUGH,
Chief Justice.

O. K.
C. L. FRAILEY,
Of Counsel for Defendants.

38 *Memorandum.*

Time to file record in Court of Appeals extended, from time to time, to, and including, May 1, 1909.

Directions to Clerk for Preparation of Transcript of Record.

Filed April 23, 1909.

In the Supreme Court of the District of Columbia.

* * * * * * *

The Clerk will please prepare the transcript of record on appeal, including therein the following:

1. Declaration, filed Nov. 27, 1907, omitting notice to plead.
2. Motion to strike out declaration, omitting notice appended.
3. Order striking out declaration and granting leave to amend.
4. Amended Declaration, omitting notice to plead.
5. Pleas.
6. Joinder in issue.
7. Memo. showing jury sworn and respited Dec. 17, 1908, and setting forth verdict Dec. 21, 1908.

8. Judgment.
9. Memo. showing appeal noted Jan'y 4, 1909, and appeal bond approved and filed Jan'y 19, 1909.
39 10. Memo. showing presentation to the court Jan'y 29, 1909, of the proposed bill of exceptions.
11. Memo. showing extensions of time for filing transcript in Court of Appeals, by orders made March 8, April 12, and April 22, 1909.
12. Bill of Exceptions and order making same part of record.
13. This order.

The original declaration, motion to strike out and order of December 29, 1907, are included herein at the request of counsel for defendants.

After stating title of suit at commencement of transcript, please omit all repetition of same.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Attorneys for Plaintiff.

Service of the foregoing order is hereby acknowledged, April 23, 1909.

A. S. WORTHINGTON,
By F.,
Attorney for Defendants.

The above is satisfactory.
C. S. FRAILEY,
Of Counsel for Defendants.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 39, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49986 at Law, wherein Joseph Marrone is Complainant and The Washington Jockey Club of the District of Columbia, a corporation *et als.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 29th day of April A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2019. Joseph Marrone, appellant, *vs.* The Washington Jockey Club of the District of Columbia (a corporation) *et al.* Court of Appeals, District of Columbia. Filed May 1, 1909. Henry W. Hodges, clerk.

THURSDAY, *March* 3rd, *A. D.* 1910.

No. 2019.

JOSEPH MARRONE, Appellant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross.

The argument in the above entitled cause was commenced by Mr. L. A. Bailey, attorney for the appellant, and was continued by Mr. C. L. Frailey, attorney for the appellees.

FRIDAY, *March* 4*th*, *A. D.* 1910.

No. 2019.

JOSEPH MARRONE, Appellant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross.

The argument in the above entitled cause was continued by Mr. C. L. Frailey, attorney for the appellees, and was concluded by Mr. L. A. Bailey, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2019.

JOSEPH MARRONE, Appellant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA a Corporation, S. S. Howland, Henry J. Morris, and Samuel Ross, Appellees.

Opinion.

(Mr. Justice VAN ORSDEL delivered the opinion of the Court.)

This cause comes here on appeal from a judgment of the Supreme Court of the District of Columbia upon a verdict directed by the Court in favor of the appellees, defendants below. For convenience, the appellant and appellees will be referred to hereafter as plaintiff and defendants, respectively.

It appears that the plaintiff, at the fall meeting, 1907, of the defendant association at the Bennings race track in this District, entered a certain horse named St. Joseph to take part in the races. The individual defendants, other than the Jockey Club, were stewards, and had charge of the grounds and the meetings. On

November 25th, the plaintiff purchased a ticket of admission to the grounds containing the following restrictions indorsed on the back thereof:

"The purchaser or holder of this ticket or badge of admission accepts the same and is admitted to the grounds of the Association upon the following expressed conditions:

"1. That he will not violate any provision of any statute prohibiting pool-selling, bookmaking or other gambling.

"2. That he will comply with and obey all the requirements, rules and regulations prescribed by the Association.

"3. That upon a breach of any of the above provisions, he will, at the request of any officer of the Association, immediately leave the grounds, and the decision of such officer that such breach has occurred shall be conclusive.

"4. That upon failure to comply with such request, he may be removed upon the order of any officer of the Association without any reason being given therefor.

"5. That he expressly waives all claims of any kind against the Association, or any officer thereof, for such expulsion. No person who has been ruled off the grounds of the Association can be admitted by this badge."

Plaintiff presented his ticket at the gate, where he was refused admission, the gateman calling to his assistance an officer of the Association. The officer informed the plaintiff that the stewards had ruled him off the track for "doping" his horses, and that he would not be allowed admission to the grounds. The officer offered to return the plaintiff the amount of money he had paid for his ticket, which offer was refused. Plaintiff returned the succeeding day, November 26th, and bought another ticket, which he succeeded in placing in the ticket box at the entrance to the grounds. He was again refused admission, and the same officer who had been called on the former occasion led him away from the entrance into the street.

It also appears that on November 23rd, immediately after a race in which plaintiff's horse St. Joseph took part, the veterinary surgeon in the employ of the defendants examined the horse and found that it had been given a stimulant. Shortly thereafter, plaintiff was informed by the stewards that his horse had been "doped", and that they were going to take his badge away from him. Plaintiff offered to pay the expense of having two or three disinterested veterinarians examine the horse, and, if necessary to protect his reputation, to have it killed and examined, also agreeing to sign a paper releasing the defendants from all liability for its value.

The amended declaration, after a somewhat extended preamble, alleges, in substance, that, on November 23, 1907, "the defendants Howland, Morris and Ross, acting as such Stewards, under the direction of the defendant corporation, in control and having the management of its affairs, conspired together with other persons whose names are to the plaintiff unknown, with intent to destroy the plaintiff's good reputation as aforesaid and to prevent horses to

be produced by him from competing in such trials as aforesaid at said Bennings Track or at other tracks, and to prevent the plaintiff from witnessing such trials at such Bennings Track or at other tracks and to humiliate and injure him in his person, his feelings and his reputation. And the plaintiff further avers that on, to wit, the 26th day of November, 1907, in pursuance of the conspiracy and intent aforesaid and in the presence of a great multitude of people at said Bennings Track, the said defendants, by their agents and employees whose names are to the plaintiff unknown, and acting on behalf and under the direction of the defendants, unlawfully and forcibly, prevented the plaintiff from entering said enclosure to witness the trials then and there being conducted as aforesaid and with force and arms did assault and beat the plaintiff and falsely and maliciously, as a pretended justification therefor publicly charge that the plaintiff had on or about the 23rd day of November, 1907, doped said horse St. Joseph, and other wrongs to the plaintiff then and there did, by means whereof the plaintiff was greatly injured in his person, his feelings and his reputation". The declaration contains a second count alleging, in substance, the refusal of the defendants to permit him to enter the grounds on the 25th of November, and alleging an assault upon the plaintiff, and that he was then and there beaten and ill-treated and imprisoned for a great length of time: The third count alleges the refusal of the defendants to admit plaintiff to the grounds on the 26th day of November, and that he was again assaulted in the manner set forth in the second count.

It would be somewhat difficult to gather from this declaration on just what the plaintiff relied to establish his right to recover, had it not be- cleared up at the trial below. It was there conceded by counsel for plaintiff that his action, as to the first count of the declaration, was based upon a conspiracy entered into by the stewards of the defendant association to charge plaintiff with "doping" his horse and to rule him off the track, for the purpose of ruining his reputation; and that, pursuant to this conspiracy, they refused to admit him to the races upon presentation of a ticket of admission at the gate. In support of the allegation of conspiracy, the plaintiff offered to prove that his horse on the occasion in question was not "doped", and this was all the proof which plaintiff offered to submit in support of the allegation of conspiracy. This fact, if established, was, of itself, insufficient to prove anything more than that the defendant's veterinary surgeon was mistaken in his diagnosis of the horse. It would not constitute evidence from which conspiracy could even be inferred. Even if the horse was not "doped", we must assume that the veterinarian acted honestly. The burden of proving the existence of a conspiracy was upon the plaintiff. To establish the charge, it was incumbent upon him to produce evidence of declaration and acts of the defendants showing, or at least tending to show, a malicious, concerted movement on their part to have plaintiff wrongfully charged with "doping" his horse, in order that an opportunity might be afforded to have him ruled off the track and prevented from coming upon the grounds. Having

established the conspiracy, the injury to his reputation might, to some extent, be inferred in estimating damages. But no such evidence was offered, the sole proof tendered being that the horse was not "doped", the only conclusion from which would be that the veterinarian was mistaken when he stated that the horse had been given a stimulant.

With the question of conspiracy entirely eliminated, the case resolves itself down to the right of the defendant association to exclude plaintiff from its grounds. It was conceded at bar that no more force was used at the gates in preventing the plaintiff from entering the grounds than was necessary. With this admission there is no necessity for our consideration of the question of false imprisonment as alleged in the second and third counts of the declaration. It is generally held that a ticket of admission to an entertainment conducted under private ownership and supervision is a revocable license, and that no action will lie in tort for the mere ejecting from such place of a person who presents himself for admission armed with a ticket purchased in the usual manner. In the early case of Wood vs. Leadbitter, 13 Mees. & W., 838, it was held that a ticket purchased to witness races was a mere revocable license, and that no action for damages would lie for the ejection of the holder from the grounds. In that case, it was claimed that the plaintiff had not been guilty of any misconduct. The rule there announced has been generally followed in this country. In Horney vs. Nixon, 213 Penn., 20, it was held that an action of trespass on the case will not lie against a proprietor or manager of a theater for refusing to permit the purchaser and holder of a ticket to occupy the seat called for by his ticket, and that the ticket was a mere license which could be revoked before the party took his seat.

The rule as to places of amusement, is entirely different from that of utilities chartered and created by law for the accommodation and benefit of the public. For example, it is undoubtedly true that anyone presenting himself for transportation on a railway train is entitled, upon paying his fare, to be carried, unless there is something in his conduct when he presents himself which justifies his exclusion. On the other hand, theaters, race tracks, circuses, private parks and places of amusement and entertainment, in the absence of some statutory regulation or restriction as to the manner in which such private enterprises shall be conducted, are entirely under the control of the proprietor or manager, and he may exclude or admit whomsoever he chooses.

The right given by the purchase of a ticket of admission to enter such places is a mere license that may be revoked at the will of the proprietor or his agents. The reason for granting such wide latitude is manifest. Anyone, however acceptable, may purchase a ticket and deliver it to one most objectionable, whose presence would not only be a reflection upon the respectability of the place, but work great injury and loss to the owner by driving away desirable patronage. The law imposes no duty upon the proprietor as to whom he shall give or refuse admission. It presumes that his own interest will assure proper treatment to those whom he may in-

vite by advertisement or otherwise to his place of entertainment or amusement, but there is no rule for his guidance except his own judgment and sense of propriety. He may exclude one because he is objectionable to the patrons of his place; he may deny another admission because his dress or personal appearance is such as to attract attention from the performance, or interfere with its progress in the manner he desires to have it conducted, and he may refuse another, as in the present case, because of alleged objectionable conduct on a former occasion. All these matters are exclusively within the control of the proprietor, and when he revokes the license granted by the sale of the ticket, the ticketholder's only remedy is for breach of the contract, which would entitle him to recover the amount paid for the ticket and the necessary expenses incurred in attending the performance. People vs. Flynn, 189 N. Y., 180; Johnson vs. Wilkinson, 139 Mass., 3; Peace vs. Spaulding, 12 Mo. App., 141; Greenberg vs. Western Turf Ass'n, 140 Cal., 357. In such a case the proprietor is not required to either justify his action or give a reason for revoking the license.

It follows, therefore, that, in the absence of an unlawful assault or false imprisonment as alleged in the second and third counts of the declaration, an action in tort will not lie for the mere refusal to admit plaintiff to the grounds of the defendant association. Plaintiff's attempt to establish a case of trespass against the defendants for refusing him admission to the grounds to his mortification, indignity, and humiliation must, therefore, fail.

It is intimated in the decisions of some of the Courts that a distinction may exist, for example as to theater tickets, between a case where the license is revoked before the holder takes the seat called for by the ticket, and where he is given notice of revocation and ejected after he has occupied the seat. Burton vs. Scherff, 83 Mass., 133. It is, however, unnecessary to consider this distinction, if any in fact or in law exists, since in the case at bar the plaintiff had not entered the defendants' grounds when the license was revoked.

The judgment is affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *April 5th, A. D.* 1910.

No. 2019, April Term, 1910.

JOSEPH MARRONE, Appellant,

vs.

THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and

adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

PER MR. JUSTICE VAN ORSDEL,
April 5, 1910.

MONDAY, *April* 18*th*, *A. D.* 1910.

No. 2019.

JOSEPH MARRONE, Appellant,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross.

On motion of Mr. L. A. Bailey, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Joseph Marrone, Appellant, and The Washington Jockey Club of the District of Columbia (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

_____

(Bond on Writ of Error.)

Know all Men by these Presents, That we, Joseph Marrone, as principal, and American Bonding Company of Baltimore, as surety, are held and firmly bound unto The Washington Jockey Club of the District of Columbia, S. S. Howland, Henry J. Morris, and Samuel Ross, in the full and just sum of Three hundred dollars ($300) to be paid to the said The Washington Jockey Club of the District of Columbia, S. S. Howland, Henry J. Morris, and Samuel Ross, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5 day of May, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Joseph Marrone, Appellant, and the said The Washington Jockey Club of the District of Columbia, S. S. Howland, Henry J. Morris and Samuel Ross, and in the dockets of said Court numbered 2019, a judgment was rendered against the said Joseph Marrone and the said Joseph Marrone having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Washington Jockey Club of the District of Columbia, S. S. Howland, Henry J. Morris and Samuel Ross citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Joseph Marrone shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

His
JOSEPH x MARRONE. [SEAL.]
mark.

AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney-in-Fact.

[Seal of American Bonding Company of Baltimore.]

Witness to x mark:
J. M. RYAN.

This bond is satisfactory.

C. L. FRAILEY,
Of Counsel for Def'ts in Error.

Approved by—
CHAS. H. ROBB,
Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2019. Joseph Marrone, Appellant, vs. The Washington Jockey Club of the District of Columbia, a Corporation, S. S. Howland, Henry J. Morris, and Samuel Ross. Bond for costs on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 10, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To The Washington Jockey Club of the District of Columbia (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Joseph Marrone is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this tenth day of May, in the year of our Lord one thousand nine hundred and ten.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted May 10, 1910.
A. S. WORTHINGTON,
Counsel for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 10, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 35 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Joseph Marrone, Appellant, vs. The Washington Jockey Club of the District of Columbia (a Corporation), S. S. Howland, Henry J. Morris, and Samuel Ross, No. 2019, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of May A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

In the Supreme Court of the United States, October Term, 1911.

No. 295.

JOSEPH MARRONE, Plaintiff in Error,
vs.
THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA et al.

Assignment of Errors.

The plaintiff in error, for an assignment of errors appearing on the face of the record herein, respectfully submits that the Court of Appeals of the District of Columbia, in and by its judgment affirming the judgment of the trial court in this suit, erred to the prejudice of the plaintiff, now plaintiff in error, as follows, viz:

1. In overruling the plaintiff's several exceptions to the action of the trial court in excluding and refusing to admit at the trial the testimony then duly offered and tendered by the plaintiff tending to prove that the defendants were without probable cause or reasonable grounds for believing or even suspecting the plaintiff to be guilty of doping the horse in question and that their act in ruling him off upon that charge was malicious.

2. In holding that the testimony tendered by the plaintiff at the trial and excluded by the trial court and referred to in the foregoing assignment of error, together with the evidence appearing in the bill of exceptions as set forth in the record, was insufficient to sustain a finding by the jury that the defendants or some of them were acting in pursuance of an agreement or tacit understanding by and between them to fasten upon the plaintiff the false charge and odium of doping a horse and to thereby effect his exclusion from the track and to injure him as charged in the first count of his declaration.

3. In holding that the plaintiff's ticket of admission mentioned in the evidence was not a contract but was merely a revocable license.

4. In holding that the defendants were justified in the use of force to exclude the plaintiff from the track.

5. In overruling the plaintiff's exception to the action of the trial court in directing the jury to return a verdict for the defendants.

LORENZO A. BAILEY,
GEO. A. PREVOST,
Counsel for Plaintiff in Error.

[Endorsed:] 295/22190.

[Endorsed:] File No. 22,190. Supreme Court U. S., October Term, 1911. Term No. 295. Joseph Marrone, Pl'ff in Error, vs. The Washington Jockey Club of the District of Columbia et al. Assignment of Errors. Filed February 27, 1912.

Endorsed on cover: File No. 22,190. District of Columbia Court of Appeals. Term No. 295. Joseph Marrone, plaintiff in error, vs. The Washington Jockey Club of the District of Columbia, S. S. Howland, Henry J. Morris and Samuel Ross. Filed May 23d, 1910. File No. 22,190.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 59.

JOSEPH MARRONE, *Plaintiff in Error,*

vs.

THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA (A CORPORATION), *et al.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a suit at law, instituted in the Supreme Court of the District of Columbia, wherein the plaintiff, now plaintiff in error, by his amended declaration, containing three counts, sought damages for injuries which he alleged were inflicted upon him by the defendants, now defendants in error. The defendants pleaded the general issue upon which he joined. At the trial, by direction of the Court, verdict

was for defendants and judgment was entered thereon, which judgment, on appeal by plaintiff, was affirmed by the Court of Appeals of the District of Columbia and is now here for review on writ of error, sued out by the plaintiff.

The first count (R., p. 4) alleges that in November, 1907, the defendant corporation, hereinafter designated as the Club, at the race track known as "Bennings Track," in the District of Columbia, was by and under the direction and management of its stewards, the defendants Howland, Morris, and Ross, in possession and control of said track and conducting trials of speed and endurance among horses, commonly known as horse races, and invited the public to attend and witness said races; that plaintiff had been for many years engaged in the promotion of the same object for which the club was incorporated, which was to encourage the art and knowledge of training, managing, and improving horses and the horse species and to promote honorable competition therein, and to conduct trials of speed and endurance among horses, and to maintain a suitable park track therefor; that doping a horse, meaning thereby the administration of a drug to a horse with intent thereby to procure artificial stimulation and an abnormal performance by such horse in a race was ever and universally regarded as discreditable and dishonorable; that on November 23, 1907, a horse known as St. Joseph, produced for the purpose by plaintiff, was by the defendants permitted to and did compete in one of said races at said track; that on, to wit, November 23, 1907, "the defendants, Howland, Morris, and Ross, acting as such stewards, under the direction of the defendant corporation, in control and having the management of its affairs, conspired together with other persons whose names are to the plaintiff unknown, with intent to destroy the plaintiff's good reputation as aforesaid and to prevent horses to be produced by him from competing

in such trials as aforesaid at said Benning track or at other tracks, and to prevent the plaintiff from witnessing such trials at such Benning track or at other tracks and to humiliate and injure him in his person, his feelings, and his reputation;" that on, to wit, November 26, 1907, in pursuance of the intent and conspiracy aforesaid and in the presence of many people at said track, the defendants, by their agents and employees and acting on behalf and under the direction of the defendants, unlawfully and forcibly prevented the plaintiff from entering the inclosure of said track to witness the trials then and there being conducted as aforesaid and with force and arms did assault and beat the plaintiff, "and falsely and maliciously, as a pretended justification therefor, publicly charge that the plaintiff had, on or about November 23, 1907, doped said horse, St. Joseph," and other wrongs did to the plaintiff, to his great injury and damage.

The second count charges false imprisonment and assault and battery at said track on November 25, 1907.

The third count charges assault and battery on November 26, 1907.

The questions involved were raised by exceptions, taken by the plaintiff at the trial, to the rulings of the court in excluding certain testimony tendered by him and in directing the jury to return a verdict for the defendants, and are substantially as follows:

1. Did the plaintiff, on November 25 or 26, 1907, by the sale and delivery to him of the ticket of admission shown in evidence (Rec., p. 8), acquire merely a revocable license? Or, on the other hand, was the transaction a contract binding upon both parties subject to the conditions printed on the ticket?

2. Was the evidence tendered by the plaintiff sufficient to sustain a verdict in his favor, and did the court err in

holding it to be insufficient and in directing a verdict for the defendants?

Evidence was adduced by the plaintiff fully establishing the matters stated by way of inducement in the first count of his declaration and also tending to prove that on Saturday, November 23, 1907 (Rec., pp. 15, 16), immediately after the race in which the horse St. Joseph ran, having been entered for that race by the plaintiff as trainer, the veterinarian, Dr. Grange, in the employ of the defendants, examined the horse by order of the stewards and later the stewards demanded of the plaintiff the surrender of his badge and license as trainer upon the ground as alleged by them, that the horse was stimulated, whereupon the plaintiff said to the stewards, Howland and Morris, "I just sent him to the stable. We can send for the horse, and take two or three men, the vest veterinarians in Washington, and I will pay the bill, to see whether that horse is doped or not," but they rejected the offer, and he then said, "Well, destroy the horse, and I will sign any paper you want, so that it won't cost the Jockey Association five cents, but it will be for my reputation," which offer they rejected, and by the defendant Howland they further responded, "No, we are going to stand by our man," meaning Dr. Grange; that on the following Monday, November 25th, the plaintiff purchased and obtained from the defendants an admission ticket for that day (Rec., p. 8), for which he then paid them the price thereof, $2, and upon which was printed, among other things, "The purchaser or holder of this ticket or badge of admission accepts the same and is admitted to the grounds of the association upon the following expressed conditions," followed by a statement of the conditions; that thereupon he attempted to pass through the entrance gate to said grounds and track, tendering said ticket (Rec., pp. 9-12), but the defendants' employees at the gate stopped him there

and refused to let him enter the grounds and forcibly removed him from the gate and out to the curb on the public sidewalk outside the grounds, saying that they did so by order of the stewards and that the plaintiff had been ruled off on Saturday; that on the following day, Tuesday, November 26th, he purchased from the defendants a similar ticket of admission for that day and was in like manner by the defendants' employees refused admission and forcibly ejected from the gate; that on each of these occasions the defendants' employees, including Pingerton men, at the gate laid hands on him and that many people, who had come to witness the races were present and witnessed what occurred, and that Captain Duhain, a Pinkerton man, stated that the defendant Howland was one of the stewards who had given the order for the plaintiff's exclusion from the track (Rec., p. 9); that said races were previously advertised by the club in the newspapers of Washington, D. C., inviting the public to attend and stating the prices of admission, each advertisement concluding with the following: "N. B.—Objectionable characters positively excluded" (Rec., pp. 12, 13).

Thereupon the plaintiff duly tendered testimony tending to prove injury to him in his reputation and otherwise by reason of his being so ruled off and excluded from the track, but the court overruled such tender and excluded the testimony, to which the plaintiff excepted (Rec., pp. 17, 18).

Thereupon the plaintiff duly tendered testimony tending to prove that in August, 1907, the said Captain Duhain, an employee of the defendants, endeavored to obtain from a druggist a statement as to whether it was true or false that the plaintiff had obtained from him, the druggist, dope for horses (Rec., p. 18); that when said horse ran in said race on Saturday, November 23, 1907, he was not doped or stimulated or under the influence of any dope or drug or

stimulant (Rec., p. 16), and that the charge that the horse was doped was absolutely false and there was absolutely no reason to believe, and the defendants had no grounds even to suspect, it to be true and that the defendants had resorted to said charge as a means of fastening the odium upon the plaintiff in order to exclude him from the track; that on said date, after the race, two experienced veterinarians, at the request of the plaintiff, examined the horse and found no evidence of dope and that in their opinion he was not at the time of the race under the influence of any drug, stimulant or dope, and by the testimony of all the plaintiff's employees who were with the horse all that day prior to the race, that no dope, drug or stimulant was administered to the horse and could not have been without their knowledge. But the court overruled the tender and excluded all said testimony, to which the plaintiff duly excepted and stated, by counsel, that under the ruling of the court he was at the end of his case, whereupon the court directed the jury to return a verdict for the defendants, which was done, subject to exception by the plaintiff.

SPECIFICATION OF ERRORS.

The Court of Appeals of the District of Columbia in and by its judgment affirming the judgment of the trial court in this suit, erred to the prejudice of the plaintiff, now plaintiff in error, as follows, viz:

1. In overruling the plaintiff's several exceptions to the action of the trial court in excluding and refusing to admit at the trial the testimony then duly offered and tendered by the plaintiff tending to prove that the defendants were without probable cause or reasonable grounds for believing or even suspecting the plaintiff to be guilty of doping the horse in question and that their act in ruling him off upon that charge was malicious.

2. In holding that the testimony tendered by the plaintiff at the trial and excluded by the trial court and referred to in the foregoing specification of error, together with the evidence appearing in the bill of exceptions as set forth in the record, was insufficient to sustain a finding by the jury that the defendants or some of them were acting in pursuance of an agreement or tacit understanding by and between them to fasten upon the plaintiff the false charge and odium of doping a horse and to thereby effect his exclusion from the track and to injure him as charged in the first count of his declaration.

3. In holding that the plaintiff's ticket of admission mentioned in the evidence was not a contract but was merely a revocable license.

4. In holding that the defendants were justified in the use of force to exclude the plaintiff from the track.

5. In overruling the plaintiff's exception to the action of the trial court in directing the jury to return a verdict for the defendants.

ARGUMENT.

I.

The first and second assignments of error are based on the second, third and fourth exceptions (Rec., pp. 19, 20), and relate to the ruling that the testimony tendered, including what was admitted together with what was excluded, was insufficient to support a finding of conspiracy as alleged in the first count.

A conspiracy, for the purposes of a civil action, is a combination of two or more persons by some concerted action to accomplish any purpose by unlawful means or an unlawful purpose by any means.

Karges Furniture Co. vs. Amalgamated Woodworkers' Local Union No. 131, 165 Ind., 421, 75 N. E., 877, 2 L. R. A. (N. S.), 788.

It may be a verbal agreement or undertaking, or a scheme evidenced by the action of the parties.

Franklin Union, No. 4 vs. People, 220 Ill., 355, 77 N. E., 176, 4 L. R. A. (N. S.), 1001, 110 Am. St. Rep., 248.

Any conspiracy the object of which is to wrongfully or maliciously injure another in business, trade, or reputation, is actionable. Although in criminal conspiracy the combination is the gist of the offense, in civil conspiracy damage is the gist and not the combination itself.

Eddy on Combinations, Secs. 371, 373, 253.

The evidence of conspiracy is generally, from the nature of the case, circumstantial. It is not necessary to prove that the defendants came together and actually agreed in terms.

"If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

Greenl. Ev. (Redf. Ed.), Sec. 93.
8 Cyc., 685.

The record here shows the defendants, Howland and Morris, acting in concert, in ruling off the plaintiff and also in asserting, as grounds for ruling him off, that the horse was stimulated, thereby implying that he was re-

sponsible for it, which assertion was wholly false and the defendants had no reason even to suspect it to be true. They had no proof of it and refused to entertain proof offered by the plaintiff as to its falsity or to make any inquiry concerning the truth or falsity of it (Rec., pp. 15, 16).

It is reasonable to infer from the testimony at least a tacit understanding by and between Howland and Morris, as stewards, to fasten upon the plaintiff an odious and injurious charge, as alleged in the first count, without any reason to believe it to be true; also to infer malice on their part or such reckless disregard of the truth and the plaintiff's reputation as to imply malice.

In an action for conspiracy to wrongfully expel plaintiff from the society, whether the members acted fairly and in good faith in finding that a letter written by plaintiff was in violation of the constitution and laws of the order, was for the jury.

St. Louis & S. W. Ry. Co. of Texas *vs.* Thompson, 113 S. W., 144 (Tex. Civ. App., 1908).

II.

The third and fourth assignments of error are based on the fifth exception (Rec., p. 21) to the action of the court in taking the case from the jury, and present several questions.

1. What rights, if any, did the plaintiff acquire by the purchase of his ticket? The authorities are not in accord.

Taylor *vs.* Waters, 7 Taunt., 374, decided in 1817, involved a theater ticket. The manager of the theater, Taylor, by deed, sold and conveyed the ticket and other tickets to one Gourgas, after which the plaintiff purchased the ticket at public auction and sued Taylor for preventing him, as holder of the ticket, from entering the theater. Defend-

ant contended that at the date of the deed of sale Taylor had no legal estate in the land and the deed was therefore void (p. 381). But the court held that the plaintiff's right under the ticket was not an interest in land but a license, irrevocable, to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing and consequently might be granted without a deed.

Wood *vs.* Leadbitter, 13 M. & W., 838, was decided in 1845. Plaintiff, after being admitted to the enclosure to see the Doncaster Races, upon a ticket which he had purchased, was requested by the defendant an officer of police by order of the steward of the races, to go out of the enclosure, in consequence of some alleged malpractices of the plaintiff on a former occasion, connected with the turf. Plaintiff refused to go out and defendant put him out, using reasonable force. Plaintiff brought his action of trespass for assault and false imprisonment and set up by replication that he was in said close by leave and license of the steward. Defendant traversed the leave and license on which traverse issue was joined. The court discussed Taylor *vs.* Waters, *supra*, and refused to follow it, and held that the right claimed by the plaintiff affected land; that such right can be created only by deed, and that the license pleaded was revocable without returning the price paid for it or assigning any reason for causing the ejection of the plaintiff from the enclosure (pp. 842, 843).

In Massachusetts, in each of two tort actions, in which the plaintiff, holding a theatre ticket, was excluded because he was a colored person, the court, following Wood *vs.* Leadbitter, *supra*, held that he acquired by his ticket a mere license which was revocable.

Mc Crea *vs.* Marsh, 12 Gray, 78 Mass., 211 (1858).
Burton *vs.* Scherpf, 1 Allen, 83 Mass., 133, decided in 1861.

In Drew *vs.* Peer, 93 Pa. St., 234, decided in 1880, the plaintiff and his wife, persons of color, holding theater tickets for reserved seats, were excluded because of their color, and he brought action in case. Verdict and judgment for plaintiff. On appeal by defendant, lessee and proprietress of the theater, she contended that the ticket was a revocable license, relying on Wood *vs.* Leadbiter, and the two Massachusetts cases, *supra*, but the court overruled the contention and held that if it was a mere license the defendant's agents had no right to revoke it as they did. The court further said: "We incline to the opinion, however, that as purchasers and holders of tickets for particular seats they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance on that particular evening" (p. 242).

The New York courts emphatically repudiate the doctrine of Wood *vs.* Leadbitter. McGoverney *vs.* Staples, 7 Alb. L. J., 219, holds that an action for assault and battery lies for forcible expulsion of a season ticket holder from the fair grounds of an agricultural society. In MacGowan *vs.* Duff, 12 N. Y. State Rep., 680, the court said:

> "If Wood *vs.* Leadbitter, 13 M. & W., 838, be the law, the plaintiff has no standing in court. But we doubt if any American court has fully adopted the decision in that case. Burton *vs.* Scherpf, 1 Allen, 133, and McCrea *vs.* Marsh, 12 Gray, 211, seem to stop far short of acquiescing in it to its full extent. In Wood *vs.* Peer, decided in 1880 by the Supreme Court of Pennsylvania, the notion that a holder of a theater ticket had merely a license that could at any time be revoked, was disproved."

To the same effect is Cremore *vs.* Huber, 45 N. Y. Sup. 947, 18 App. Div. 231.

In Smith *vs.* Leo, 92 Hun, 242 (1895), a tort action on the case, defendant conducted a dancing school and received from plaintiff the price of admission and thereafter expelled him. Verdict and judgment for plaintiff was sustained, holding that the action is analogous to that of a passenger for illegal removal from a railroad train, and that defendant had no right to turn plaintiff out of the hall in the absence of sufficient cause, and that the damages might properly include compensation for the indignity and disgrace.

Collister *vs.* Hayman, 183 N. Y., 250 (1905), holds a theater ticket is a license, subject to "any reasonable condition appearing upon the face thereof," and, though granted for a consideration, is revocable for a violation of such condition in the manner specified therein.

Wandell's Law of the Theater, 221 (Albany, 1891), and Brackett's Theatrical Law, 166 (Boston, 1907), advance the proposition that a theater ticket is merely a revocable license, but Wandell is clearly struggling against the decisions in his own State and the weight of authority there and elsewhere. Brackett, although supported by the decisions in his own State, evidently realizes the weakness of the proposition. He contends (p. 165) that the theater is private property and its business is private, in opposition to People *vs.* King, 110 N. Y., 418, 428, decided in 1888, in which the court said, quoting Waite, C. J., in Munn *vs.* Illinois, 94 U. S., 113: "Where one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use," which the court refers to as a "*quasi* public use."

Among the cases cited by Brackett in support of his contention are Pearce *vs.* Spalding, 12 Mo. App., 141, and Greenberg *vs.* Western Turf Association, 140 Cal., 357. The former was a suit for refusal to sell to the plaintiff

theater tickets for reserved seats, and the latter was under a California statute.

Brackett says (p. 189) that the right of revocation is not abridged by statutes prohibiting discrimination because of race or color, but later (p. 190) he admits that—

> "this doctrine seems to be established in direct opposition to the theory on which the right or license of admission to a theater rests, for if a license is legally revocable and the manager has full and unrestricted powers to admit or refuse admission to his place of entertainment, which is his private property in the same degree as a man's dwelling house, then such statutes are in abrogation of private property rights and not within the powers of police control over public business, or matters which are recognized as proper for restrictive legislation under the constitution."

The establishment of the doctrine referred to demonstrates the fallacy of the theory of revocability for which Brackett and Wandell contend.

> People *vs.* King, 110 N. Y., 418.
> Baylies *vs.* Curry, 128 Ill., 287, 21 N. E., 595.
> Joseph *vs.* Birdwell, 28 La. An., 382, 26 Am. R., 102.

An article in 12 Cent. L. J., 390, purports to be a review of the cases, commencing with 7 Taunt, *supra*, and states that Drew *vs.* Peer, supra, is against the weight of authority, but the writer, like Wandell and Brackett, does not appear to have examined all the authorities or approached the subject with due regard for well established principles. In the case in 12 N. Y. S. R., 680, *supra*, cited by Wandell (p. 231), and in W. T. Walker Furniture Co. *vs.* Dyson, 32 App. D. C., 90, the reasoning in Wood *vs.* Leadbitter and in the early Massachusetts cases was rejected, the court holding, in the case in 32 App., "that a person who has a

right to enter upon the land of another and there do an act may use what force is required for the purpose without being liable to an action," though such right was not acquired by deed, which is in accord with the later decisions in Massachusetts.

A license, founded upon a valuable consideration, to enter the land of another, is not revocable at the will of the licensor.

Ditch Co. *vs.* Ditch Co., 10 Colo. App., 276, 50 Pac., 731 (1897).

Burrow *vs.* Terre Haute & L. R. Co. 107 Ind., 432, 8 N. E., 167 (1886).

The weight of authority and the proposition sustained by reason and well established principles as stated in 28 A. & E. Enc., 124, is that the holder of a ticket of admission to a theater has more than a revocable license; his right is more in the nature of a lease, entitling him to ingress and egress, and where the holder of a ticket of admission to a place of public amusement is wrongfully ejected, the wrongdoer is liable for all consequential damages resulting from the unlawful ejection.

2. The condition printed on the ticket (R., p. 8), that the decision of an officer of the association shall be conclusive is inapplicable in this case, in which the decision was *ex parte* and in flagrant disregard of the plaintiff's right to have an inquiry as requested by him (Rec., pp. 15, 16).

3. The conditions upon which the defendants could refuse to admit plaintiff are specified on the back of the ticket. The good faith of the stewards in their decision is directly impeached and put in issue in this suit and, upon all the evidence, was a question of fact for the jury.

St. Louis & S. W. Ry. Co. of Texas *vs.* Thompson, 113 S. W., 144, above cited.

III.

The court below erred in its views as to the nature and extent of the rights acquired by the plaintiff in the purchase of the ticket, and also as to the sufficiency of the testimony to sustain a verdict for the plaintiff, and also in taking the case from the jury; and for these reasons the judgment should be reversed and new trial awarded.

Respectfully submitted.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 59.

JOSEPH MARRONE, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA, A CORPORATION; S. S. HOWLAND, HENRY J. MORRIS, AND SAMUEL ROSS.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

In the first count of the amended declaration in this case the defendants are charged with having entered into a conspiracy against the plaintiff and to have done several things injurious to him in carrying out that conspiracy. Of course, the mere fact of conspiracy would not be actionable. The averments of the first count on that subject are merely a preamble to the main charge, which consists of the acts alleged to have been done on the 26th day of November, 1907, in carrying the conspiracy into effect. These acts are:

First. Preventing the plaintiff from entering the enclosure of the defendants where certain horse races were going on.

Second. Assaulting and beating the plaintiff.

Third. Falsely and maliciously, as a pretended justification for such exclusion and assaulting, publicly charging that the plaintiff three days before had "doped" a horse called St. Joseph, which, with the consent of the defendants, the plaintiff had entered in the races then going on.

That the plaintiff was prevented from entering the enclosure of the defendants was proved and is not disputed.

As to the second charge, there is no evidence introduced or offered tending to prove that anybody assaulted or beat the plaintiff on the occasion in question, it being conceded by the plaintiff's counsel that no more force was used than was necessary to prevent the plaintiff from forcibly entering the enclosure against the wishes of the proprietors thereof. In the opinion of the Court of Appeals in this case it is said, on page 26:

> "It was conceded at bar that no more force was used at the gates in preventing the plaintiff from entering the grounds than was necessary."

And as to the last of these three charges, that when the plaintiff was excluded from the enclosure the defendants, as a pretended justification, publicly charged him with "doping" the horse St. Joseph, there was not a particle of evidence introduced or offered tending to support the charge.

At to the first count, therefore, the only question involved is whether an action in tort for damages to the plaintiff's feelings lies because he was prevented from entering the race-track grounds.

The second count of the declaration charges that the defendants, on the 25th day of November, 1907, by their agents and employees, assaulted the plaintiff and prevented him from entering the Benning race track and then and there beat the plaintiff and imprisoned him.

The third count simply charges an assault by the defendants, through their agents and employees, on the 26th day of November, 1907.

There was no evidence presented and none offered tending to support the charge of assaulting and imprisonment contained in these two counts. Therefore as to them also the only question involved is whether the plaintiff is entitled to recover damages in an action *ex delicto* because after he had purchased a ticket he was not allowed to go into the race track and see the races.

(It is true that there was some evidence introduced, and some evidence tendered by the plaintiff's counsel, relating to a charge made against the plaintiff that his horse had been unduly stimulated prior to his going into a race on the 23d day of November. The plaintiff testified that after the race in question one of the defendants' employees came to him on the track and demanded his trainer's badge and license. So far as appears no one knew of this except the employee in question and the plaintiff himself. Marrone testified that he then went to the stewards and saw the defendants Howland and Morris—the defendant Ross not being present and Morris not doing any talking—and that Howland said: "Mr. Marrone, your horse has got a stimulant." Upon the plaintiff protesting that the charge was untrue, and offering to have the horse destroyed, or have the best veterinaries in Washington called in, Howland replied: "No, we are going to stand by our man," referring to Dr. Grange, the veterinary employed by the defendants. It was not claimed at the trial that any other person was present when this took place, much less "a great multitude of people," to use the language of the first count. Evidently the facts involved no claim against anybody except the defendant Howland, and this occurrence is not made the basis of any claim in the declaration.)

ARGUMENT.

The exclusion of the plaintiff from the race-track enclosure gave him no cause of action against the defendants except at the most a right to sue for breach of contract, in which, on the evidence in this case, his damages would have been limited to the amount paid for his tickets.

A leading case on this question in England came before the Court of Exchequer in a suit in which it was held that a ticket to witness races is a mere revocable license and that no action lies for damages for the exclusion of the person who has purchased such a ticket. In that case the plaintiff had not in any way misconducted himself. The court intimated that an action for breach of the contract contained in the plaintiff's ticket of admission might lie against those who issued or sold it to him, but stated that that question it was unnecessary to discuss. The purchaser was not tendered the amount he had paid for the ticket, nor was it returned to him, and the court held that that made no difference.

Wood vs. Leadbitter, 13 Mees. & W., 838.

The following cases apply the same doctrine to theater tickets, as to which obviously the principle is the same:

In Horney vs. Nixon, 213 Pa., 20; 1 L. R. A. (N. S.), 1184, it was held that an action of trespass on the case will not lie against the manager or proprietor of a theater for refusing to permit a person to occupy the seat called for by the ticket which that person has purchased; that a theater ticket is a mere revocable license, for the revocation of which, before the holder has actually been given and taken his seat, the only remedy is an assumpsit for breach of the contract, in which action only actual damages for such breach of the contract can be recovered. The court stated that

such actual damages had been tendered to the individual whose admission to the theater had been refused when the purchase price of the ticket had been tendered back to him. The case of Drew *vs.* Peer, 93 Pa., 234, was overruled, the court observing that what was said in the Drew case about tickets being more than a mere revocable license should be regarded as simply *obiter dictum*, and that even as such it was not in accord with the authorities in this country and in England.

In McCrea *vs.* Marsh, 12 Gray (Mass.), 211-213, it was decided that a theater ticket is only a license to enter the part of the theater specified upon it; and if, before the holder has entered, the licenser, with no more force than is necessary for the purpose, prevents him from entering, he cannot maintain an action of tort for the exclusion. The court further held that such a license is legally revocable and that the plaintiff's attempts to enter the theater after the license was revoked were unwarranted, and the defendant rightfully used the force necessary to prevent his entry. The court said:

> "The plaintiff is doubtless entitled to recover in an action of contract the money paid by him for the ticket and all legal damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket."

In Burton *vs.* Scherpf, 1 Allen (Mass.), 133-136, it was held that the sale of a ticket to a concert is only a revocable license to the purchaser to enter the building in which it is given, and to attend the performance; and that if revoked before the performance commences and before he takes the seat designated in the ticket and he, notwithstanding, remains after being requested to leave, he becomes a trespasser, and may be removed by the use of force necessary for that purpose; and his only remedy therefor is by an action upon the contract contained in the ticket.

The two decisions just above cited are approved in Johnson *vs.* Wilkerson, 139 Mass., 3.

In Pearce vs. Spalding, 12 Mo. App., 141-144, a theater proprietor who was about to produce a repertoire of grand opera advertised that the season sale of reserved seats would open at 9 o'clock on a certain day. The plaintiff in that case was the first person at the box office and tendered the price of certain seats and demanded tickets for them and was refused; subsequently tickets for these same seats were sold to other persons. Thereupon the plaintiff brought suit for damages for the refusal to sell to him. The court held that such a proprietor was not bound to sell any chosen seat for the entire period of the performances to the person who first presented himself and tendered the price thereof. The court observes, "Theaters are not necessities of life, and the proprietors of them may manage their business in their own way. If that way is unfair or unpopular, they will suffer in diminished receipts."

In Buenzle vs. Newport Amusement Asso., 68 Atl. R., 721 (R. I.), damages for injured feelings because of refusal to admit plaintiff to a dance hall were held to be not recoverable in an action for breach of contract contained in the ticket of admission.

In Meisner vs. Detroit, Belle Isle & Windsor Ferry Company, 154 Mich., 545 (1908), the defendant corporation owned a ferry and owned also an island in the Detroit River, which it operated as an amusement park. It used the ferry only to carry passengers to and from this pleasure park. It refused to accept one Meisner as a passenger. He brought suit and got a judgment on a verdict directed by the court for the amount paid for his ticket only. The Supreme Court of Michigan affirmed the judgment, saying:

> "Counsel do not disagree as to the law of common carriers of passengers. Any one, no matter what his character is or has been, presenting himself for transportation to such carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theaters, circuses, race tracks, private

parks, and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by the authorities that these are private enterprises, under the control of private parties, and that they may license whomsoever they will to enter, and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted, it may be revoked. So, also, the right to enter may be refused to any one.

* * * * * * *

"*Wood vs. Leadbitter, supra*, is very similar in its facts to this case. It is cited with approval in several of the above-cited cases. Pleasure grounds of this character are not necessities of life, any more than are theaters and race tracks; and, unless restrained by some provisions of their charters, their owners can impose any terms of admission they choose. No such restraints are imposed upon the defendants in this case. The defendant can exact an entrance fee at the park, or it can compensate itself by charging for transportation to it and admit its patrons otherwise free to the park. The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry. It is perhaps due to the plaintiff to say that he denies the improper conduct charged against him, but his rights in no sense depend upon the reason given for his exclusion."

In "W. W. V. Co." *vs.* Black, 75 S. E. Rep., 82, 85 (a case decided in June, 1912, by the Supreme Court of Virginia), it was held that an action of tort will not lie against the proprietor of a theater for not performing his contract evidenced by a ticket of admission, but that a patron holding a ticket who is prevented from entering a theater or who is removed therefrom after entering can sue only on the contract for the money paid and damages for the breach of the contract. The court quotes to this effect from 21 Enc. Pl. & Pr., 647,

and says that "the text seems to be sustained by the great weight of authority."

In Shubert *vs.* Nixon Amusement Company, 83 At. Rep., 369 (a case decided in May, 1912, by the Supreme Court of New Jersey), the same conclusion was reached, the court holding that Wood *vs.* Leadbitter, *supra*, is a leading case on this subject and had been approved in New Jersey in many cases.

In Taylor *vs.* Cohn, 47 Oregon, 538, 540 (decided in 1906), a colored person had been refused admission on his theater ticket to a box seat, an employee of the theater telling him that he must change his seat, as colored people were not allowed to occupy boxes. The ticket holder refused to comply with this request and left the theater. The court said:

> "A ticket to a theater or other place of amusement is a mere license, revocable at the pleasure of the theater manager. It is true it constitutes a contract between the proprietor and the purchaser of the ticket and whatever contractual duties grow out of such relation the proprietor is bound to perform or respond in damages for the breach of his contract, but he is not liable for an action in trespass or in tort."

In the brief on behalf of the plaintiff in error it is said that the New York courts emphatically repudiate the doctrine of Wood *vs.* Leadbitter. In support of this statement counsel cite the following cases:

1. McGoverney *vs.* Staples, 7 Albany L. J., 219, in which case it was held in 1873 by the Supreme Court, Fourth Department, that a farmer and his family were unjustifiably expelled from an agricultural fair.

2. MacGowan *vs.* Duff, 12 N. Y. St. Rep., 680 (a case decided in 1887 by the Court of Common Pleas for the City and County of New York, which is reported also in 14 Daly, 315), in which the court, just before saying what is quoted on page 11 of the adverse brief, says:

"We have not thought it necessary at this time to express any opinion as to the plaintiff's right of action."

3. Cremore *vs.* Huber, 18 App. Div., 231, a case which was decided in 1897 by the Appellate Division, Second Department. In that case the plaintiff, a negro, had been put out of a place of amusement, and, as the court held, there was a question for the jury whether he had been guilty of disorderly conduct so as to justify the expulsion. The court added, however:

"If he [the plaintiff] did not by his conduct forfeit his right to remain, it was not his duty to leave on the request of the defendants."

The court refers to section 383 of the Penal Code of New York as prohibiting the exclusion of persons from places of public amusement on account of their race or color.

4. Smith *vs.* Leo, 92 Hun., 242, a case decided in 1895 in the Appellate Division, Fourth Department, in which the court said:

"In substance it was alleged that the defendant had willfully deprived the plaintiff of the employment of a right that he had purchased of the defendant. The method of expulsion is not stated, but the word expelled ordinarily means to drive or force out or reject. So that the defendant impliedly not only deprived the plaintiff of his right, but, with indignity and disgrace, put him out of the hall where, by his contract with the defendant, he had a right to be."

5. Collister *vs.* Hayman, 183 N. Y., 250. This, it will be perceived, is the only New York case cited on behalf of the plaintiff in error which was decided by the court of last resort in that State. In that case a ticket speculator sought to have the proprietor of a theater enjoined from interfering with his exercise of his calling on the sidewalk in front of the theater. The tickets which the plaintiff had obtained

contained a provision invalidating them if resold on the sidewalk. The court simply held that the condition was legal and refused the injunction.

If these New York cases stood alone in that State, they would give little comfort to the plaintiff in error. He was not ejected from a place of amusement in the face of the public. He, knowing that he had been denied the privileges of the race track, tried twice to force himself in where he knew he was not wanted.

But the law in New York is not with the plaintiff in error, emphatically or otherwise.

In Purcell *vs.* Daly, 19 Abbott's New Cases, 301 (decided by the Court of Common Pleas in the city of New York, sitting in General Term, in 1886, it was held that the proprietor of a licensed place of amusement had the right to exclude a person from entering his premises, although the person excluded had purchased a ticket of admission. The court said:

> "If tickets are sold to a person, the proprietor may still refuse admission, in which case the proprietor would be compelled to refund only the price paid for the ticket of admission, together with such other expense as the party might have been put to, but which expense must be directly connected with the issuing of the ticket of admission. * * * A theater ticket is simply a license to the party presenting the same to witness a performance to be given at a certain time and being personal in its character can be revoked."

And in People *ex rel.* Burnham *vs.* Flynn, 114 App. Div., 576, affirmed in Court of Appeals, 189 N. Y., 180, the law was definitely determined to be in accordance with the rulings of the Supreme Court of the District of Columbia and the Court of Appeals of the District in the case at bar. In that case a dramatic critic had published articles reflecting severely upon certain theaters and their patrons controlled by a body called the Theater Managers' Association, in consequence of which he was excluded from a dozen dif-

ferent theaters. He caused a member of this association to be indicted under a New York statute for conspiring with others to prevent him from exercising his lawful calling of dramatic critic. The accused was found guilty by the city magistrate before whom the case was tried, but on *habeas corpus* it was adjudged, both by the Appellate Division and by the Court of Appeals of New York, "that the relator and his associates in the Theater Managers' Association acted in the exercise of their strict legal rights." The Appellate Division said:

> "The relator and his associates did not, therefore, enter into an unlawful agreement when they agreed amongst themselves that complainant should not be admitted to the various theaters managed by them. If they disliked his presence, or thought his attendance was injurious to their business, they could agree that he should not be permitted to attend. If he attempted to do so, their place of amusement being their own, and being a private place so far as any individual or the public was concerned, they had a right, by such reasonable force as was necessary, to prevent him from entering. Their acts, therefore, in so preventing him were not unlawful acts. In *People vs. Kostka* (4 N. Y. Cr. Rep., 420), relied upon by the respondents, the overt acts which the defendants committed were unlawful and intimidating and threatening. Any number of men may combine to do a lawful act, and such combination does not subject them to either civil or criminal liability. (*National Protective Association vs. Cumming,* 170 N. Y., 315.)"

And the Court of Appeals said:

> "The remaining question in the case is whether the proprietor of a theater has the right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of any express statute controlling his action. At this late day the question cannot be considered an open one in this State. There are a number of cases arising out of the purchase of theater tickets from speculators on the side-

> walk after notification by the proprietor that the same will not be honored at the door" (citing Collister *vs.* Hayman and Purcell *vs.* Daly, *supra*). "These cases illustrate the absolute control that the proprietor of a theater exercises over the house and the audience. He derives from the State no authority to carry on his business, and may conduct the same precisely as any other private citizen may transact his own affairs. * * * The holder of a ticket which entitles him to a seat, at a given time in a place of amusement, being refused admission, is entitled to recover the amount paid for the ticket, and, undoubtedly, such necessary expenses as were incurred in order to attend the performance."

It is assumed above that it is immaterial whether there was evidence introduced or offered tending to support the charge of conspiracy found in the first count of the declaration in this case. But as that charge is discussed by the Court of Appeals as one involved in the determination of the case it is not amiss to call the attention of this court to the fact that there was not a word of evidence introduced by the plaintiff or excluded by the court which tended to prove that the defendants conspired "to destroy the plaintiff's good reputation," or "to prevent horses to be produced by him from competing in such trials as aforesaid at said Benning track or at other tracks," or "to prevent the plaintiff from witnessing such trials," or "to humiliate and injure him in his person, feelings or reputation." There was no suggestion that the defendant Ross was concerned with the matter at all. There was no suggestion that the Washington Jockey Club had authorized any conspiracy or that anything had been brought to its knowledge that might lead its officers or agents to suspect the existence of any preconceived design to interfere with Marrone's horse-racing business or to injure him in any way. The only evidence against the defendant Morris was that he was present when Howland told Marrone that his horse had got a stimulant, and said: "We are going to stand by our man," referring to the veterinary employed by the jockey club (15).

Counsel for the plaintiff in error seek to apply to this case the doctrine laid down by this court in Munn *vs.* Illinois, 94 U. S., 113, in which case it was held that in the absence of legislation by Congress the State of Illinois had a right to regulate the charges made by owners of elevators in Chicago for the storage and handling of grain. This conclusion was sustained upon the ground that in view of the surrounding circumstances the owners of these elevators had devoted them to a use in which the public had an interest—that they in effect granted to the public an interest in such use and must, to the extent of that use, consent to control by the public for the common good. Counsel argue that because theaters may be regulated by law they are also devoted to the public use, and assumes that for that reason the owners of places of amusement may not revoke a license given to a patron entitling him to enter such a place.

But the argument proves too much. The owners of theaters and other places of public amusement, it is true, ordinarily are required to obtain a license before opening their places to the public. But it is almost as common to require persons engaged in the ordinary vocations of life to pay a license fee. And so the building and use of a house by a private person for private purposes is regulated by law. No one may lawfully build a house in the city of Washington without first getting a license (in this case usually called a permit), and before getting such license he must satisfy the authorities that he will conform to scores of regulations relating to the material to be used in the structure, the width of the walls, the construction of the plumbing apparatus, the manner of introducing electric wires or gas fixtures, and numerous other matters of detail.

All that was held in Munn *vs.* Illinois, *supra*, was that the State might regulate the price which the owners of the elevators referred to in that case should charge for the use of them. It is believed that there is no instance in this country of a statute undertaking to regulate the price of admission to

theaters, concerts, circuses, and other places of amusement, and it may well be questioned whether any such statute would be valid, either by the Constitution of the United States or the Constitution of any of the States. Certainly the mere facts that a license or permit must be obtained before building a private house and that the manner of building is regulated by law do not prevent the owner of the house, when finished, from excluding from the premises those who seek to enter it with or without an invitation from him.

As to the case of W. T. Walker Furniture Company *vs.* Dyson, 32 App. D. C., 90, all that was involved or decided in that case was that where the owner of a private house has in his possession in the house personal property belonging to another, to whom he has by a formal contract given the right to enter the house and take the property away, he has no right to prevent the other party from entering the house and removing the property. Only the criminal law can successfully be invoked in such cases.

The distinction between the rights of one entitled to enter the premises of another under such a contract and the rights of the purchaser of a ticket to a place of amusement is very elaborately considered in Wood *vs.* Leadbitter. On the whole it is submitted that the judgment of the Court of Appeals should be affirmed.

CHARLES L. FRAILEY,
A. S. WORTHINGTON,
Attorneys for Defendants in Error.